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Supreme Court of the United States

October Term, 1959

No. 461

JOHN F. ISELIN and JOAN B. ISELIN,
Petitioners,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER COMPANY, INC.,
Respondents.

PETITION OF JOHN F. ISELIN AND JOAN B. ISELIN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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Vicksburg, Mississippi.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justice of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Fifth Circuit, entered on August 13, 1959, affirm-

ing the judgment of the United States District Court for the Western Division of the Southern District of Mississippi, entered on November 21, 1958.

I.

OPINION.

The Opinion of the United States Court of Appeals, for the Fifth Circuit was rendered and filed on the 13th day of August, 1959, and appears at page 154 et seq. of the Transcript of Record on appeal, and page 25 this Appendix.

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted in the United States District Court for the Western Division of the Southern District of Mississippi, by the filing of Plaintiffs' Petition for Declaratory Relief (R.P. 2 et seq.) The Petition shows that the Plaintiffs are residents and citizens of the State of Indiana; and that of the Defendants, Lester J. Meng, Lester J. Meng, Jr., and James C. Meng are residents and citizens of Natchez, Adams County, Mississippi; and the General Box Company and C. W. Hunter Company, Inc., being nonresident corporations, and legal process was had on all of the Defendants; that the value of the lands involved is far in excess of the statutory amount of $3,000.00.

Plaintiffs in their Petition set forth that they are the owners in fee simple of the following described tracts or parcels of land purchased by them on April 30, 1949, at a tax sale held by the Sheriff of Madison Parish, Louisiana, as per deed recorded in Book "LL", page 550 of the Records of Conveyances of Madison Parish, Louisiana, and that the period for redemption having expired absolute title vested in them and that they have not parted with title, by sale or otherwise, to said lands since the date of acquirement:

That said lands are legally described, as follows:

Fractional Section 17, containing 112.28 acres, and all accretions thereto;

Fractional Section 19, containing 164.24 acres, and all accretions thereto;

Fractional Section 20, containing 158.12 acres, and all accretions thereto;

Fractional Section 21, containing 165.91 acres, and all accretions thereto;

Fractional Section 22, containing 176.25 acres, and all accretions thereto;

Fractional Section 23, containing 172.43 acres, and all accretions thereto;

save, less and except that certain tract of 1367 townhead land in the southerly part of Sections 19, 20, 21 and 22 and described by metes and bounds in a deed from Albert W. Iselin and Louise S. Iselin, in favor of the Mengel Company, and recorded in Book No. "W", Page 397, of the conveyance records of Madison Parish, Lou-

isiana; and which aforesaid tracts of land were originally within the confines of Madison Parish, Louisiana, until about the year 1904, when by reason of what is known historically as the "Killakranka" cut-off parts of said sections of land cut-off were left in place, No. 1 as "Tulane Island"; No. 2 as "R-58 Towhead"; and No. 3 as "1867 Towhead Island", together with accretions thereunto, belonging, remained Louisiana lands as "Sargent's Point" until about the year 1929 when certain Mississippi River Commission maps erroneously showed Sargent's Point, Louisiana, as being Diamond Point, Mississippi, notwithstanding all of the original Mississippi Diamond Point, Hankinson's Section 5, and all accretions thereto were washed away to the mouth of "Killakranka" 1904 cut-off, and to the deserted 1904 river bed and to the intersection by the 1908, 1913, 1920 and 1924 river course into and through Payne Lake, containing therein the states' boundary line; that the 1904 "Killakranka" cut-off shifted westward to its present-day location—and through which the state boundary line does not follow; that the Mississippi River in 1908 scoured out a channel flowing east in the former westflowing 1828 deserted river bed; and that all such parts of Sargent's Point, Louisiana lands as were "left-in-place lands", and with the accretions thereto, were erroneously shown between the years 1925-1930 on certain maps as Diamond Point, Mississippi, but since the United States Supreme Court has established a changed state boundary line, it has caused said lands to now be in Township 14, Range 2 East, Warren County, Mississippi, but which does not void ownership or invalidate title to such lands.

Petition further sets forth that immediately after the decision of the United States Supreme Court accepting the Special Master's Report, and which decision is reported in 350 U. S. page 5 et seq., 100 Lawyers Edition, page 6, the lands owned by them were stricken from the assessment rolls of Madison Parish, Louisiana, and thereupon became an integral part of Warren County, Mississippi, and within her jurisdiction.

And the Petition additionally sets forth that the Defendants have illegally taken possession of said lands and refuse to surrender possession thereof to Plaintiffs, and prays for the pronouncement by the District Court of a Declaratory Judgment herein declaring Plaintiffs the legal owners in fee of the lands in question.

III.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Chapter 81, Sections 1254 (1), Title 28 (U. S. Laws), reading:

> "Cases in the Courts of Appeal may be reviewed by the U. S. Supreme Court by Writ of Certiorari granted upon the petition of any party to a civil case, before or after rendition of judgment."

The Opinion of the United States Court of Appeal for the Fifth Circuit was filed on August 13, 1959. Petition for Rehearing was filed on August 31, 1959; rehearing was denied on September 11, 1959; and an order staying the mandate for thirty days, pending the application for

Writ of Certiorari in the United States Supreme Court was entered on September 21, 1959.

IV.

QUESTIONS PRESENTED.

The questions presented, are as follows:

1.

Should not the lower courts have permitted the Petitioners *a trial on the merits?*

2.

Did not the judgment of the lower court affirming the judgment of the District Court taking away Petitioners' vested rights of property in these fractional sections and accretions wholly violate their rights under the federal constitution and amendments thereto?

3.

Should not the lower court have reversed said erroneous judgment of the District Court and remanded said cause for a trial on the merits?

4.

Shoupld not the lower court after holding that the District Court at Monroe, Louisiana, had no right at law to enter a judgment in the matter being without juris-

diction of the subject-matter, and could ony dismiss said cause without prejudice as to the rights of the Petitioners, and by the same token the lower court should have held that the Mississippi District Court's decision and judgment granting summary judgment of dismissal, *without a trial on the merits*, was wholly against the law and an unlawful, illegal and unjust taking of these Petitioners' property, by judicial fiat in complete derogation of their legal rights under the federal constitution and amendments thereto?

5.

Did not the lower court err in that after holding the Louisiana District Court was without authority of law for rendering any judgment herein, being without jurisdiction of the subject-matter, immediately thereafter in their opinion adopt the line of argument of said Louisiana District Court relative to the validity of Petitioners' tax title?

6.

Did not the lower court err in holding that the report of the Special Master in *Mississippi vs. Louisiana* was determinative of contested land titles within the prescribed boundary?

7.

Did not the lower court err in that after stating and holding that the judgment of the Louisiana District

Court was without validity, in then accepting part of the said judgment as that of the instant court?

8.

Did not the lower court err in affirming the judgment of the Lower Mississippi District Court?

9.

Did not the lower court err in not holding that the title of these Petitioners to the lands and accretions in question was founded on a valid and unquestioned muniment of title and on the occupancy and possession of the lands in question for approximately ten years, by the payment of taxes and assessments thereof, by the exercise of all rights and prerogatives of proprietorship, and not negatived by the fact that by the line of demarcation drawn by the United States Supreme Court in *Mississippi vs. Louisiana* in 1955, it was placed within the territorial jurisdiction of Mississippi?

10.

Does not the judgment of the lower Mississippi District Court and the affirmation of it by the lower Court destroy vested property rights of these Petitioners?

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Fifth Circuit has herein decided a case involving important principles of law in the federal Courts in direct conflict with the rules and decisions governing these principles, as enunciated by the United States Supreme Court, the several Circuit Court of Appeals and District Courts.

CONCLUSION.

Wherefore, Petitioners respectfully pray that this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Fifth Circuit, entered on August 13, 1959 in the above entitled cause be granted, and the Writ of Certiorari issue forthwith.

Petitioners attach hereto and are filing herewith a Certified Transcript of Record in said cause showing all proceedings had in the District Court and the United States Court of Appeals for the Fifth Circuit.

L. BRYAN DABNEY,
Attorney for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. .....

JOHN F. ISELIN and JOAN B. ISELIN,
Petitioners,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER COMPANY, INC.,
Respondents.

BRIEF ON BEHALF OF JOHN F. ISELIN and JOAN B. ISELIN, PETITIONERS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The judgment rendered by the District Court of the United States for the Western Division of the Southern District of Mississippi will be found at page 144 et seq. of the Transcript of Record. The judgment of the United States Court of Appeals for the Fifth Circuit affirming this judgment will be found at page 144 et seq. of the Transcript of Record. The opinion of the United States Court of Appeals for the Fifth Circuit will be found at page 154 et seq. of the Transcript of Record.

II.

JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. 347).

III.

STATEMENT OF THE CASE.

The material facts of the case will be found at page 6 et seq. of the foregoing Petition.

IV.

SPECIFICATIONS OF ERRORS.

(1) The United States Court of Appeals for the Fifth Circuit erred in refusing to apply the rules, decisions and procedure laid down by the Supreme Court of the United States, and the other Circuit Courts of Appeals.

(2) That the allegations in the Petition for Declaratory Relief should be taken as true; and that, therefore, said Court was in error in affirming the judgment of the lower court dismissing said cause; that in so holding the Court refused to apply the rules and law in the decisions of the United States Supreme Court.

(3) Appellants except to and allege as vital error, the judgment of the Court rendered in said cause on the

13th day of August, 1959, wherein it passes over passively and affirms the error of the lower District Court in not allowing and permitting Appellants a trial on the merits.

(4) That the judgment of the Court in affirmation as well as the original judgment of the District Court taking away these Appellants' vested rights of property in and to these lands and accretions by judicial fiat is in derogation of all of their rights under the federal constitution and amendments thereto.

(5) That the Court erred in not reversing said judgment of the lower District Court and remanding said cause for a trial on the merits.

(6) That while the Court was correct in holding that the lower District Court at Monroe, Louisiana, had no right at law to enter a judgment in the matter, being without jurisdiction of the subject-matter, and could only dismiss said cause without prejudice as to the rights of the Plaintiffs, but by the same token this Court should have held that the lower Mississippi District Court's decision and judgment granting summary judgment, without a trial on the merits, was wholly against the law and an unlawful, illegal and unjust taking of these Appellants' property in complete derogation of their legal rights under the federal constitution and amendments thereto.

(7) That the Court erred in this respect—that after holding the lower Louisiana District Court was without

authority of law for rendering any judgment herein, being without jurisdiction of the subject-matter, immediately thereafter in their opinion adopted the line of argument of said Louisiana District Court relative to the validity of Appellants' tax title.

(8) That the Court erred in holding that the Report of the Special Master in *Mississippi vs. Louisiana* was determinative of contested land titles within the described boundary.

(9) That the Court erred in that after stating and holding the judgment of the Louisiana District Court was without validity, in then accepting part of said judgment as that of the instant Court.

(10) That the Court erred in affirming the judgment of the lower District Court.

(11) That the Court erred in not holding that the title of these Appellants to the lands and accretions in question was founded on a valid and unquestioned muniment of title, and on the occupancy and possession of the lands in question for approximately ten years, by the payment of taxes and assessments thereon, by the exercise of all rights and prerogatives of proprietorship, and not negatived by the fact that by the line of demarcation drawn by the United States Supreme Court in *Mississippi vs. Louisiana* in 1955, it was placed within the territorial jurisdiction of Mississippi.

(12) The Court erred in holding that the authorities cited by it on page 7 of the Opinion were and are controlling, and all of which antedated the decision of the United States Supreme Court in *Mississippi vs. Louisiana.*

(13) That the judgment of the lower District Court and the affirmation of it by this Court destroys vested property rights of these Appellants, and is against the law.

V.

SUMMARY OF ARGUMENT.

(1) The Petitioners were entitled to a trial on the merits in the Mississippi District Court, and in denying them this right the lower Courts refused to apply the rules, decisions and procedure laid down by the Supreme Court of the United States, and the other Circuit Courts of Appeals.

(2) That Petitioners' allegations in the Petition for Declaratory Relief should have been taken as true.

(3) That Petitioners were entitled to have the United States Circuit Court of Appeals for the Fifth Circuit reverse said judgment of the lower District Court.

(4) That Petitioners' constitutional rights were violated, and their land taken away by judicial fiat, in derogation of their rights under the United States Constitution and Amendments thereto.

(5) That grave error was committed by the U. S. Circuit Court of Appeals Fifth Circuit in not reversing said cause and remanding same for a *trial on the merits.*

(6) That Petitioners' constitutional rights were violated by the United States Court of Appeals for the Fifth Circuit invalidating part of the decision and judgment of the Louisiana District Court, and then adopting that part invalidating Petitioners' valid tax title.

(7) Same as Summary Argument "6" *supra.*

(8) Report of the Special Master in *Mississippi vs. Louisiana* was not determinative of contested land titles within the described boundary and could not adversely affect Petitioner's valid tax title.

(9) Same as Summary Argument "6" *supra.*

(10) Petitioners had unqualified right to have the United States Court of Appeals for the Fifth Circuit reverse the judgment of the lower District Court *in toto.*

(11) Petitioners should have been decreed to have a valid title to the lands and accretions in question as founded on a valid and unquestioned muniment of title and on the occupancy and possession of the lands in question for approximately ten years, by the payment of taxes and all assessments thereon, by the exercise of all rights and prerogatives of proprietorship, and not negatived by the fact that by the line of demarcation drawn by the United States Supreme Court in *Mississippi vs.*

Louisiana in 1955, they were placed within the territorial jurisdiction of Mississippi.

(12) The constitutional rights of Petitioners were negatived by the citations of the United States Court of Appeals for the Fifth Circuit, on page 7 of the opinion.

(13) Petitioners' vested property rights are destroyed, *without a semblance of a trial on the merits,* by the decisions and judgments of the lower Courts.

VI.

ARGUMENT.

(A). This Honorable Court in the following cases set a rule that should have governed the instant case, and become binding upon all Federal Courts.

This Honorable Court in the case of *Polk Co. v. Glover*, 305 U.S. 5, S. Ct. 15, enunciated a rule equally applicable to the instant court, saying:

> "We think the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issue (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice."

And again in the case of *Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, this Court said:

> "The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption in favor of the jurisdiction of the trial court, that respondents might be able to prove them."

Citing also: *United States v. Lee*, 106 U. S. 196, 218, 219, 27 L. ed. 171, 181, 1 S.Ct. 240; cf. *Tindal v. Wesley*, 167 U. S. 204, 213 et seq., 42 L. ed. 137, 142, 17 S. Ct. 770.

And this Court, speaking through Mr. Justice Miller had this to say:

> "In the case supposed the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration."

And the various Circuit Courts of Appeals have held as follows:

A motion to dismiss the complaint in an action for a declaratory judgment is the equivalent of a "demurrer" and the court must accept as true all the allegations of the complaint and on that basis determine whether the complaint presents a cause of action under

this chapter. *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.*, C. C. A. Ill. 1941, 123 F. 2d 518.

In action for declaratory judgment, allegation in plaintiff's pleading must be taken as true on motion to dismiss. *Consolidation Coal Co. vs. Martin*, C. C. A. Ky. 1940, 113 F. 2d 813.

On a Motion to Dismiss the Court must accept as true allegations of the Complaint. *Abel vs. Munro*, D. C. N. Y. 1939, 27 F. Supp. 346.

The Court in ruling on a Motion to Dismiss a Petition for Declaratory Judgment must accept all such allegations in the Petition as true, and determine whether the Petition or Declaration presented a cause of action based upon the federal statute. *Northern Motor Corp. vs. Divco-Twin Truck Co.*, D. C. Mich. 1939, 28 F. Supp. 308.

Evidence which parties expect to introduce at the trial on the merits cannot be considered on a Motion to Dismiss the complaint, but the Petition must be judged by its allegations. *Bagby vs. Cleveland Wrecking Co.*, D. C. Ky. 1939, F. Supp. 271.

On a Motion to Dismiss for failure to state a claim disclosing a cause of action, the Court was required to assume Appellants' ability to prove facts averred and hence to accept averments as facts. *Shaw's vs. Wilson Jones Co.*, D. C. Pa. 1939, 26 F. Supp. 713.

A Motion to Dismiss complaint on the ground that it fails to state a claim on which relief can be granted, is limited to the pleading. *Sherover vs. John Wanamaker*, D. C. N. Y. 1939, 29 F. Supp. 650.

Allegations of complaint are admitted by Motion to Dismiss. *Midwest Haulers vs. Brady*, C. C. A. Ohio, 1942, 128 F. 2d 496.

On Motion to Dismiss, it must be assumed that a complaint states the truth. *Mandley vs. Backer*, 1941, 121 F. 2d 875, 73 App. D. C. 412.

On Motion to Dismiss complaint for failure to state a claim upon which relief can be granted, allegations of complaint will be assumed to be true. *Niagara Motors Corporation vs. McGowan*, D. C. N. Y. 1942, 45 F. Supp. 796.

Allegations of complaint were admitted for purposes of Appellee's motion to dismiss complaint. *Hunt vs. Crombock*, D. C. Pa. 1941, 44 F. Supp. 796.

For purpose of Motion to Dismiss, allegations of complaint would be taken as true. *Ferguson vs. Reed*, D. C. Pa. 1942, 44 F. Supp. 387.

On Motion to Dismiss, the allegations of the complaint were assumed to be true. *Stuff vs. La Budde Feed & Grain Co.*, D. C. Wis. 1941, 42 F. Supp. 493.

On Motions to Dismiss, every presumption and inference from pleadings must be resolved in favor of

pleader. *Geismar vs. Bond & Goodwin*, D. C. N. Y. 1941, 39 F. Supp. 536.

On Motion to Dismiss, allegations of complaint must be taken as true. *Crockett vs. Wiedemann*, D. C. Cal. 1941, 39 F. Supp. 266.

The lower court's action in deciding on a motion for summary judgment a case presenting complicated issues of law and fact, was an abuse of judicial discretion, and against the law.

Iselin, et al. vs. C. W. Hunter, 173 Fed. Rep. (2d), 388;
Firemen's Mutual Ins. Co. vs. Aponaug Mfg. Co., 149 F. 2d 359;
American Ins. Co. vs. Gentile Bros. Co., 109, F. 2d 732;
Cohen v. 11 West 24th St. Inc., 115 F. 2d 531;
United States ex rel Broderick et al., 59 F. Supp. 189;
Monroe vs. I. C. R. R. Co., 24 F. Supp. 731;
Arenas v. The United States, 322 U. S. 419;
Leimer v. State Mutual Life Assurance Co., 108 F. 2d 302.

The Rules of Civil Procedure for the federal courts were promulgated for the purpose of obtaining decisions in controversies on the merits rather than the abrupt dismissial thereof on technicalities, and unless the court can determine purely from the viewpoint of the law that there is no genuine issue to be considered, the case should not be disposed of on motion for summary judgment.

The motion for a summary judgment was never intended as a substitute for a trial, and should never be granted or sustained where there is any doubt what the truth or law is. It should be granted sparingly.

It cannot be denied by the counsel or parties on either side of this controversy that it is a very complex blending of law and fact; that there is involved complex and difficult interpretations of boundaries, the changes in the channel of the river, the twin doctrines of *res judicata* and estoppel, and construction and interpretations of conveyances, and yet the lower court endeavored to settle all of these issues instanter without so much as permitting the parties to join issue in a trial on the merits.

While on this point, we should like to make the observation that it is passing strange that a matter of more or less identical similarity was presented to the United States Supreme Court in *Mississippi vs. Louisiana, supra*, and that court confided it to the ministrations of a Special Master recognizing their inability to pass on the technical and complex problems involved, whereas, the lower court passed on all of the matters in a purely routine manner, and in a hearing lasting less than forty-five minutes!

(B) The argument and authorities contained in the foregoing subsection "A" applies to Paragraphs "2", "3," "4", "5", "6", "7", "12" and "13" of the "Summary Judgment" section.

(C) As to Paragraph "8" of the "Summary Judgment" section, Petitioners would show to this Honorable Court that the Report of the Special Master, as well as the decision of the United States Supreme Court accepting said report, is not decisive in any manner, shape or form of the instant case; that all they did was to draw the boundary line between the two states, and did not and could not decide any contested land titles in said area, except insofar as the establishing of the new state boundary line might place lands in one state or another.

We cite: *Mississippi vs. Louisiana*, 350 U. S. 5; and Special Master's Report, accompanying same.

(D) As to Paragraphs "9", "10", and "11" of the "Summary Judgment" section, Petitioners would show that both of the lower Courts were guilty of an abuse of judicial discretion in holding that Petitioners' tax title was ineffectual.

Petitioners obtained possession of said land at a tax sale by the Sheriff of Madison Parish, Louisiana on April 30, 1949, for the state taxes due for the year 1948, approximately six years before the decision in *Mississippi vs. Louisiana*. From the date of their purchase until after the United States Supreme Court's decision in *Mississippi vs. Louisiana* they were carried in Petitioners' names on the assessment rolls of Madison Parish, Louisiana, and they yearly paid taxes thereon.

We refer this Court to the following beautiful "word-painting" by Vattel, quite analogous to the instant case:

"Nature has not herself established a private property of any of her gifts, and particularly over land; she only approves its establishment for the advantage of the human race. On this ground, then, it would be absurd to suppose, that, after the introduction of domain and property, the law of nature can secure to a proprietor any right capable of inducing disorder into human society. Such would be the right of entirely neglecting a thing that belongs to him,—of leaving it during a long space of time under all the appearances of a thing utterly abandoned or not belonging to him—and of coming at length to wrest it from a bona fide possessor who has perhaps dearly purchased his title to it, who has received it as an inheritance from his progenitors, or has a portion with his wife, and who might have made other acquisitions, had he been able to discover that the one in question was neither solid nor lawful. Far from giving such a right, the law of nature lays an injunction on the proprietor to take care of his property, and imposes on him an obligation to make known his rights, that others may not be led into error; it is on these conditions alone that she approves of the property vested in him and secures him in the possession. If he has neglected it for a such a length of time that he cannot now be admitted to reclaim it without endangering the rights of others, the law of nature will no longer allow him to revive and assert his claims. We must not therefore conceive the right of private property to be a right of so extensive and imprescriptible a nature that the proprietor, at risk of every inconvenience thence resulting to human society, absolutely

neglect it for a length of time, and afterwards reclaim it, according to his caprice."

Petitioners and their predecessors in title have had uninterrupted, continuous, open, notorious, and adverse possession of these lands since the year 1828, whereas those parties in opposition to their claims and rights base their suppositious and specious claims on one John Leigh Hyland's accretions to Section 4—a wholly untenable and illegal claim!

The lands are there in place, where they have always been, and if given a legal opportunity, and for which they and their predecessors in title have been persistently claiming the right to,—a trial on the merits—for the past seventeen years, they would beyond the peradventure of a doubt show a sound, definite and conclusive legal title.

CONCLUSION.

Petitioners therefore submit that a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit, in order that said judgment may be brought into conformity with the controlling decisions of the Supreme Court of the United States.

Respectfully submitted.

L. BRYAN DABNEY,
Attorneys for Petitioners.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17688

JOHN F. ISELIN and JOAN B. ISELIN,
Appellants,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER CO., INC.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(August 13, 1959.)

Before RIVES, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The plaintiffs, appellants here, claim ownership of lands in the area known as Diamond Point, situate in Warren County, Mississippi. They brought suit in the United States District Court for the Southern District of Mississippi against the defendants, appellees here, saying that the defendants had unlawfully taken possession of the land and refused to surrender it to the plaintiffs. A declaratory judgment was sought declaring the plaintiffs to be the owners

of the land. The plaintiffs, by their complaint, alleged the source of their title to be a tax deed issued to them in April, 1949, by the Sheriff of Madison Parish, Louisiana. The tax deed described the land as being in Madison Parish, Louisiana, and is recorded in that Parish. Warren County, Mississippi, and Madison Parish, Louisiana, lie on opposite sides of the Mississippi River which is, for the most part, the boundary between the two states. The plaintiffs state in their complaint that the land involved was originally on the west of the Mississippi River and in the State of Louisiana, that although a change in the course of the river placed it west of the land, the land remained in Louisiana until, in 1955, as a result of the decree of the Supreme Court of the United States in the case of *State of Mississippi v. State of Louisiana*, 350 U. S. 5, 76 S. Ct. 29, 100 L. Ed. 6, reh. den. 350 U. S. 905, 76 S. Ct. 175, 100 L. Ed. 794, "the lands became a part of Warren County, Mississippi." It is the claim of the plaintiffs that they acquired title from the State of Louisiana at a time when the land was a part of Louisiana and that their title was not lost or divested when the land became a part of Mississippi. The defendants filed a motion to dismiss asserting that the question raised by the suit had been settled by *State of Mississippi v. State of Louisiana*, *supra*.

Annexed to the motion are a number of exhibits. One of these is the Report of the Special Master to the Supreme Court in the *Mississippi v. Louisiana* case. This Report incorporates a stipulation entered in the record of the case by the State of Louisiana by which it was

admitted that the area known as Diamond Point was not in Louisiana but was in Mississippi. The Master discussed the evidence taken before him relating to the boundary between the two States as it was and as it had been. Findings were made based upon this evidence. The portion of the findings relating to Diamond Point concluded with the following:

> "Suffice it to say that from the uncontradicted evidence I find that the State of Mississippi at all times for more than fifty years exercised jurisdiction and sovereignty over the body of land known as Diamond Point. This record discloses no assertion by the State of Louisiana prior to the institution of this suit, of any claim to such land.
>
> "Summary of Findings of Fact as to Diamond Point:
>
> "1. I find, based upon the admissions of the State of Louisiana and upon the evidence, that Diamond Point is located in the State of Mississippi, and that the correct boundary between the States of Mississippi and Louisiana in the Diamond Point area is as described in the next part of this Report.
>
> "2. I find that under the doctrine of prescription the State of Mississippi has acquired title to the area known as Diamond Point and that its claim thereto has been acquiesced in by the State of Louisiana over a long period of time."

The Report of the Special Master was adopted. The Decree fixed the boundaries between the two States. Diamond Point, including the land claimed by the plaintiffs, is on the Mississippi side of the boundary.

The defendants also annexed to their motion to dismiss a copy of a final decree entered by the United States District Court for the Western District of Louisiana in an action brought by John F. Iselin in which a title was asserted to the land here involved under the same Louisiana tax deed as is relied upon in the present suit. The Louisiana case had been held under advisement until *Mississippi v. Louisiana* was decided. After the decision of the Supreme Court the District Court for the Western District of Louisiana, on motion for summary judgment, held that under the Supreme Court decree the Louisiana tax deed was void and the grantees acquired nothing by it. The cause was dismissed with prejudice. The defendants here assert that the decree of the Court sitting in Louisiana is controlling on the question in this case.

It would seem that the District Court for the Western District of Louisiana after determining that the land involved was situated in another state and another judicial district, should have dismissed the suit for lack of jurisdiction over the subject matter. 1 Barron & Holtzoff, Federal Practice and Procedure, Rules Ed., 137 et seq. § 72; *Smith v. Landis*, 5th Cir. 1954, 211 F. 2d 166; *Woolgar v. La Coste*, D. C. W. D. La. 1947, 69 F. Supp. 571. We think the judgment of the Court sitting in Louisiana is without validity. *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 S. Ct. 771, 39 L. Ed. 913; *Equitable Trust Co. v. Washington-Idaho Water L. & P. Co.*, D.C.E.D. Wash. 1924, 300 F. 601. If this be so then of course the judgment of the District Court of the

Western District of Louisiana cannot be *res judicata* on the merits.

Although of the opinion that the decree of the District Court for the Western District of Louisiana is not *res judicata*, we find ourselves in complete agreement with the conclusion which it reached as to the validity of the tax deed which is the primary muniment of the plaintiffs' title.

In the report of the Special Master in the case of *Mississippi v. Louisiana*, *supra*, it was stated:

> "The undisputed evidence showed that opposite the original mainland of Warren County, Mississippi, the land on the right or Louisiana bank of the Mississippi River at Diamond Point was eroded by action of the river over a long period of years and caved into the Mississippi River and disappeared.
>
> "Contemporaneously a point bar (Diamond Point Bar) was formed and built by accretions to the Mississippi shore in a northerly and westerly direction until it extended over the entire territory known as Diamond Island or Diamond Island Towhead.
>
> "As the Mississippi shore was thus extended by accretions, the thalweg or main navigable channel of the Mississippi River also moved in a northerly and westerly direction; and as the thread of said channel thus moved, the boundary line between the States of Louisiana and Mississippi was also moved in a northerly and westerly direction, remaining

at all times at the thread of said channel around Diamond Point Bar to the north, west and south."

The soundness of this conclusion is sustained by the principles announced by this Court which, in a case very similar to the case before us, said:

"The center line of the main channel of the Mississippi River forms the boundary between Louisiana and Mississippi at the point where the land in controversy lies. Under the Mississippi law, a riparian proprietor on the Mississippi River owns to the thread of the stream. Changes in the physical aspects of riparian lands are common, and have resulted in much litigation in which certain legal principles have become firmly established.

"Where the main channel of a stream forms the boundary between states, and gradual changes wrought by natural causes occur in the physical topography of the banks or islands and in the channel of the stream, the main channel of the stream, in whatever changed location it may be, continues to be the boundary; but where an avulsion occurs by reason of a freshet or flood, and the course of the stream suddenly is changed, the boundary remains at the center of the old channel of the deserted river bed.

"Applying these legal principles to the facts pleaded in the petition, it clearly appears that no claim was stated upon which relief could be granted. The land in controversy, though originally a part of Louisiana, now lies in Warren County, Mississippi. The movement of the land was not caused by a sudden change in the course of the Mississippi River, but was gradually and imperceptibly accom-

> plished over a period of half a century by natural causes inherent in the normal flow of the river. Irrespective of to whom the land in controversy once belonged, it has now become the property of the riparian proprietor of the Mississippi shore adjacent to the isand." Iselin v. La Coste, 5th Cir. 1944, 139 F. 2d 887, cert. den. 321 U. S. 790, 64 S. Ct. 791, 88 L. Ed. 1080. See also Paepcke v. Kirkman, 5th Cir. 1932, 55 F. 2d 814; Johnston v. State, Miss. 98 So. 2d 445.

The approved findings of the Special Master show that the change of the thalweg or main channel of the stream was not the result of an avulsion but was caused by gradual erosion over a period of many years. It follows that the boundary followed the thalweg and that the land claimed by the plaintiffs was, as in *Iselin v. La Coste, supra*, in Warren County, Mississippi. The land claimed, being in Mississippi at the time of the issuance of the plaintiffs' tax deed, was not the subject of a grant from the State of Louisiana.

The plaintiffs' contention that a boundary change was effected and the land involved was transferred from one state to the other by the decree in *Mississippi v. Louisiana* cannot be sustained. The courts can determine the location of boundaries but cannot change them. *Washington v. Oregon*, 211 U. S. 127, 29 S. Ct. 47, 53 L.Ed. 118.

The adjudication of the boundary between states by the Supreme Court of the United States is controlling as to the situs of the property as being within the one

state or the other and is binding upon parties litigant over the titles to lands. See *Crawford v. White*, Tex. Civ. App. 25 S. W. 2d 629, cert. den. 283 U. S. 823, 51 S. Ct. 346, 75 L. Ed. 1437.

The judgment of the district court is

AFFIRMED.

A True copy:

Test:

EDWARD W. WADSWORTH,
(Edward W. Wadsworth),
(Seal) Clerk, U. S. Court of Appeals,
Fifth Circuit.

New Orleans, Louisiana, Sep. 23, 1959.

JUDGMENT.

Extract from the Minutes of August 13, 1959.

No. 17,688.

JOHN F. ISELIN and JOAN B. ISELIN,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER CO., INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, John F. Iselin and Joan B. Iselin, and the surety on the appeal bond herein, United States Fidelity and Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING.

Extract from the Minutes of September 11, 1959.

No. 17,688.

JOHN F. ISELIN and JOAN B. ISELIN,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER CO., INC.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

STAY OF MANDATE.

Filed September 23, 1959.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 17,688.

JOHN F. ISELIN and JOAN B. ISELIN,
Appellants,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER CO., INC.,
Appellees.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy

of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the abovementioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 21st day of September, 1959.

(S.) WARREN L. JONES,
United States Circuit Judge.

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No. 461.

JOHN F. ISELIN and JOAN B. ISELIN,
Petitioners,

versus

LESTER J. MENG, LESTER J. MENG, JR., JAMES C. MENG, THE GENERAL BOX COMPANY, INC., and C. W. HUNTER COMPANY, INC.,
Respondents.

PETITION FOR RE-HEARING.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States of America, and Associate Justices:

The Petition for Re-hearing filed herein by John F. Iselin and Joan B. Iselin, residents and citizens of the State of Indiana, and the original Petitioners for a Writ of Certiorari in this Court, would respectfully show to this Court, as follows:

Petitioners show that on the 7th day of December, 1959, this Court entered an order denying Petitioners' Petition

for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit in that certain cause entitled *"John F. Iselin, et al. vs. Lester J. Meng, et al.,"* and being numbered 17,688 on the docket of the United States Court of Appeals for the Fifth Circuit; and now with great deference desire to show and point out to this Court that said Order denying the issuance of a writ of certiorari should not have been entered in said cause; and that they are entitled to a re-hearing herein for the following reasons:

These Petitioners show that there are issues involved which should appeal particularly to the discretionary powers of this Court. Here we have a land title controversy that originated in the spring of 1942, and has been "see-sawing" through state and federal courts for nearly eighteen years; and that these Petitioners and their predecessors in title hold not only the legal, but also the equitable title to all of the lands in question, and have been unwilling to stand idly by without a vehement protest at the continuing attempt of various adverse interests, through stretched legalisms, to deprive Petitioners of their lands.

The spirit as well as the letter of the law, should protect the lawful owners in the enjoyment of their lands—not deprive them of it; and the protecting aegis of the federal constitution should not permit it to be taken away by strained legal formalism.

We re-iterate here, and make specific reference to the eleven grounds set forth in the Petition for Re-hearing

in the United States Court of Appeals, Fifth Circuit, and which are set forth *in extenso* in the record accompanying the Petition for Writ of Certiorari in this Court, and we invite this Court's careful and detailed attention to same. We contend that on any one of these eleven grounds this Court would be justified in exercising its discretionary powers and bringing this cause up for judicial review.

The instant case finds a worthy parallel in the celebrated *Myra Clark Gaines* batture case which pursued its tortuous course through state and federal courts from 1833 to 1893--a period of sixty years, and finally resulted in a decisive victory for Mrs. Gaines some eight years after her death. It had been before the United States Supreme Court for over sixty years. Thirty of your predecessors had sat on it in one or another of its aspects, not to mention the numerous judges and officers of the state or federal courts before whom it appeared. The last time the record of the case was carried to Washington from New Orleans two trunks were required to contain it, and the United States Supreme Court frankly admitted its inability to read the record as presented.

In conclusion, Petitioners request that this Court reconsider their action in entering the said order denying the issuance of the Writ of Certiorari, re-open the matter, and forthwith issue the Writ of Certiorari as prayed for.

Respectfully submitted,

JOHN F. ISELIN and
JOAN B. ISELIN,
By L. BRYAN DABNEY,
Of the Law Firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that in my opinion, as Counsel for Petitioners, the grounds of the foregoing Petition for a Rehearing are well founded; and that it is presented in good faith and not for delay, and that said Petition is restricted to the grounds above specified.

This 21st day of December, 1959.

L. BRYAN DABNEY,

Counsel for Petitioners.